87-971

Supreme Court, U.S.
FILED
DEC 14 1987
JOSEPH F. SPANIOL, JR.
CLERK

No. 87-

IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

ANITA KAYE LOFTIN-BOGGS,

Petitioner,

v.

CITY OF MERIDIAN, MISSISSIPPI, JAMES L. GARRETT, SR., Individually and as City Engineer and Director of Public Works, and NEAL CARSON, Individually and as Assistant Director of Public Works,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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QUESTIONS PRESENTED

1. Whether the United States Court of Appeals for the Fifth Circuit properly dismissed the appeal of petitioner because her *pro se* notice of appeal did not specifically refer to the order which had dismissed her sex discrimination claims.

2. Whether the United States Court of Appeals for the Fifth Circuit properly affirmed the lower court's dismissal of her slander claim on the ground that petitioner was a vortex public figure.

STATEMENT PURSUANT TO RULE 28.1 AND PARTIES TO THE PROCEEDINGS.

Kaye Loftin-Boggs was the appellant in the Court of Appeals. The appellees in the Court of Appeals were the City of Meridian, Mississippi, James L. Garrett, Sr., and Neal Carson as parties to the proceedings. The petitioner is Kaye Loftin-Boggs. The respondents are the City of Meridian, Mississippi, James L. Garrett, Sr., and Neal Carson.

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IN THE

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OCTOBER TERM, 1987

No. 87-_____

ANITA KAYE LOFTIN-BOGGS,

Petitioner,

v.

CITY OF MERIDIAN, MISSISSIPPI, JAMES L. GARRETT, SR., Individually and as City Engineer and Director of Public Works, and NEAL CARSON, Individually and as Assistant Director of Public Works,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

OPINIONS BELOW

The opinion of the court of Appeals is unreported (App. 2.).[1]

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[1] The orders dismissing the Title VII claims of the petitioner for failure to specifically refer to that order and the ruling of the Court of Appeals on the petition for rehearing and suggestion of rehearing *en banc* were denied by memorandum orders without opinions.

JURISDICTION

The judgment of the court of appeals was entered on September 17, 1987. (App. 3). The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATEMENT OF THE CASE

Petitioner, employed as a chemist with the City of Meridian, Mississippi, was terminated from her employment because of her sex and because she sought to challenge the unlawful actions of her supervisors, respondents Garrett and Carson. She sued respondents in the federal district court where she asserted her First and Fourteenth Amendment constitutional rights and a common law slander claim for which she sought damages and requested a trial by jury. In the same complaint, she asserted rights under Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e, for which she sought the statutory remedies provided. The district court conducted a trial for which the jury and non-jury causes were consolidated. At the conclusion of the trial, the judge by directed verdict dismissed petitioner's slander claim; the jury returned a verdict for the respondents on petitioner's constitutional claims. After taking the Title VII claims of sexual discrimination, sexual harassment and retaliation under advisement, the district court judge denied all relief. Post trial motions on the jury issues were denied by subsequent order.

Petitioner filed a notice of appeal, *pro se*, to the United States Court of Appeals for the Fifth Circuit, in which she referred only to the most recent order of the district court which had denied the post trial motions on the constitutional claims and the common law/slander claim. The court of appeals dismissed petitioner's claims under Title VII on the ground that she had failed to appeal those

issues when she only made specific refererce in her notice of appeal to the order of the district court denying her post trial motions on the jury claims.

In a later opinion, the court of appeals affirmed the directed verdict on the petitioner's common law slander claim, holding petitioner to be a limited—purpose public figure because she had sought press coverage for her grievances and the news media had granted that coverage because the controversy appeared newsworthy.

REASONS FOR GRANTING THE WRIT

Petitioner raises two distinct questions to this Court. The treatment both questions by the court of appeals was the application of form over substance to effectively deny the petitioner a full and complete opportunity for access to the courts. The court of appeals dismissed the appeal of petitioner with respect to her Title VII claims because in her *pro se* notice of appeal, she had referred only to the final order entered in her case by the district court. The court of appeals thus denied the opportunity for review of the merits of petitioner's case in violation of the established principles of this Court to avoid such prejudicial application of rules of procedure where the opposing party is not prejudiced and the effect of the notice of appeal can be easily ascertained.

Similarly, the court of appeals affirmed the directed verdict of the district court on petitioner's common law slander claim by holding petitioner to be a limited—purpose public figure because of publicity she initiated about her grievance *after* the underlying facts of her grievances had resulted in her being fired from her employment for unlawful reasons.

It is submitted that our system of justice encourages judicial review of the substance of the claims of an

aggrieved party and to deny that by relying on technicalities is the denial of a fundamental right.

I. WHETHER THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT PROPERLY DISMISSED THE APPEAL OF PETITIONER BECAUSE HER *PRO SE* NOTICE OF APPEAL DID NOT SPECIFICALLY REFER TO THE ORDER WHICH HAD DISMISSED HER SEX DISCRIMINATION CLAIMS

The complaint in this cause raised claims under Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 1983 and a pendent state law claim of slander. A jury trial was requested and granted for the 42 U.S.C. § 1983 and the slander claims. A consolidated trial was conducted with the jury hearing all of the evidence but being instructed and deciding only the Section 1983 and slander claims. The trial court reserved ruling on the Title VII claims and rendered an opinion subsequent to the completion of the trial. The following chronology was before the court of appeals when it dismissed petitioner's appeal of these issues:

1. On April 28, 1986, the district court clerk entered partial judgment dismissing the § 1983 and state law slander claims as a result of a jury verdict on the § 1983 claims and a directed verdict with regard to the slander claim.

2. On May 2, 1986, the district court issued its opinion holding that the plaintiff had failed to establish her Title VII claim.

3. On May 7, 1986, petitioner served her post trial motion seeking relief with regard to the § 1983 and slander jury claims.

4. On May 9, 1986, the district court entered the "final judgment" on its dismissal of the Title VII claims.

5. On June 7, 1986, the district court denied petitioner's post trial motion and the order was entered on June 17, 1986.

6. On July 16, 1986, petitioner filed the notice of appeal to the United States Court of Appeals for the Fifth Circuit. The notice of appeal was from the order of the court entered June 17, 1986.

7. The Fifth Circuit dismissed the Title VII claims because the petitioner had specified in her notice of appeal that she was appealing from the order denying the post trial motion and had not included her Title VII claims in her notice of appeal.

In *United States* v. *Ellicott*, 223 U.S. 524 (1912), a judgment was entered after which a motion for new trial was filed. Later a motion to amend the findings of fact was filed and an order was entered on that motion. Notice of appeal was filed from the judgment which denied the motion for new trial. In addition to finding that the appeal had been filed within the time required, the Court stated that the failure to specify in the notice of appeal the final judgment entered immediately after the trial was not fatal. 223 U.S. at 539. See also *State Farm Mutual Automobile Insurance Company* v. *Palmer*, 350 U.S. 944 (1956) which reversed the dismissal by the court of appeals of an appeal which had mistakenly specified in the notice a non-appealable order of the trial court.

That is precisely what happened in this case. Petitioner related in her notice of appeal the last order entered so that it would be apparent that her notice of appeal was from the last order of the district and was being filed in a timely fashion. She could not have noticed an appeal from the final judgment which was entered on May 8, 1986, because there was still pending before the district court the post trial motion with regard to the jury issues.

Petitioner thus could only file her notice of appeal within thirty days from the date which the court entered the order denying the post-trial motions even though her appeal related in part to issues finally decided by earlier judgment. To have done so earlier would have split her case and probably required her to proceed with an interlocutory appeal. This would have been undesirable as a matter of judicial efficiency and, it is submitted, is not encouraged by the rules of procedure.

It is only logical that once the final judgment was entered and post-trial motions were ruled on, the petitioner would notice her appeal on the last order entered. That she related her notice of appeal to that order should not penalize her by denying her the right to appeal the issues decided in the case. That she failed to specify in her notice of appeal the final judgment entered immediately after the trial was not fatal. *U.S.* v. *Ellicott*, 223 U.S. at 539.

The Fifth Circuit, as well as others, have adopted a policy of liberal construction of notices of appeal prevails in situations where the intent to appeal an unmentioned or mislabeled ruling is apparent and there is no prejudice to the adverse party. *C.A. May Marine Supply Co.* v. *Brunswick Corp.*, 649 F.2d 1049, 1056 (5th Cir. 1981), citing with approval *Simpson* v. *Norwesco, Inc.*, 583 F.2d 1007, 1009 n.2. (8th Cir. 1978).[2] *C. A. May* stated the criteria: where the intent to appeal an unmentioned or mislabeled ruling is apparent; where there is no prejudice

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[2] See also *Gainey* v. *Brotherhood of Railway and Steamship Clerks, etc.*, 303 F.2d 716, 717-718 (3rd Cir. 1962); *Holz* v. *Smullan*, 277 F.2d 58, 61 (7th Cir. 1960); *Maryland Tuna Corp.* v. *MS Benares*, 429 F.2d 307, 318 (2nd Cir. 1970); *Peabody Coal Co.* v. *Local Union Nos. 1734, 1508, 1548, UMW*, 484 F.2d 78, 81 (6th Cir. 1973).

to the adverse party; or where the claims or issues are inextricably intwined. In addition to the liberality with which this Court treats this issue, a litigant proceeding *pro se*, should receive even greater deference. In this case, the court of appeals plainly failed to apply this Court's standards as well as its own.

The claims under the Title VII count and under the 42 U.S.C. § 1983 count were so entwined and interrelated that "each may be reviewed even though not referred to in the notice of appeal." *C.A. May Marine Supply, supra* at 1056.

The facts and proof at trial arose from the employment relationship between parties. Petitioner's Title VII claims and the causes alleged under the constitution tracked the same chronology of events: her complaints of sexual discrimination led her to invoke the grievance procedures of the City; the retaliation from the ruling on her grievance led to her discharge. Her claims under Title VII and under the Fourteenth Amendment to the Constitution were precisely from the same chronology of events. They were inextricably entwined and could not be reasonably separated so as to prosecute separately on appeal.

All proof was presented at the one trial to the jury and to the court. In the closing arguments before the jury on the Section 1983 claim, the respondents' attorney argued freely about the Title VII claims even though the jury would not decide them. The exhibits introduced from the personnel file of petitioner related both to the Section 1983 and Title VII claims. Petitioner made no complaints about violations of her constitutional rights during the grievance procedure, yet repeatedly during the closing argument before the jury, counsel for the defendants made references to her sexual discrimination/harassment

grievance. The issue of petitioner's exclusion from staff meetings because of her sex was a part of her Title VII claim and was an issue in the sexual discrimination grievance procedure but counsel addressed the issue during his argument to the jury which only considered the Section 1983 claims.

The respondents argued to the jury these matters of sexual discrimination, sexual harassment because all of the claims and issues and facts in the case were so meshed together, so "inextricably entwined," that it was impossible to separate them. The respondents can hardly claim that they were prejudiced nor were they without notice that the claims were so entwined as to give them any disadvantage. In fact, the respondents offered no evidence of prejudice nor did they argue that they were misled in any way.

In *Serzysko* v. *Chase Manhattan Bank*, 461 F.2d 699 (2nd Cir. 1972), the plaintiff had filed a series of post-trial motions. The motions were denied but the notices of appeal referred only to the orders denying those motions. The court held:

> The denial of a Rule 59 motion is normally appealable only in connection with the judgment to which it relates . . . . [H]owever, appellate courts may consider an appeal of only the denial of a Rule 59 motion as harmless error and treat the appeal as being the underlying judgment when such an appeal would be timely. . . .

461 F.2d at 701. The court noted the liberal construction to be accorded a *pro se* pleading and such construction should be applied here.

Where the petitioner's notice of appeal led to an interlocutory order and not the final order, the Fourth Circuit

Court of Appeals has rejected the contention that it lacks jurisdiction to consider the final judgment in the case.

> [T]his defect is not fatal where it can be reasonably inferred from the notice of appeal that the intent of the appellant was to appeal from the final judgment, if it also appears that the appellee has not been misled.

Lumbermen's Mutual Insurance Co. v. *Massachusetts Bonding and Ins. Co.*, 310 F.2d 627, 629 (4th Cir. 1962).

Petitioner was not a lawyer and could not afford a lawyer at the time she filed her appeal. She was barely ambulatory (due to the morning sickness caused by her pregnancy) at the time that she filed her appeal. Holding her to the same standards of expertise as a lawyer would be unjust and particularly when to do so would be contrary to the liberal interpretation this Court has placed on notices of appeals.

2. WHETHER THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT PROPERLY AFFIRMED THE LOWER COURT'S DISMISSAL OF HER SLANDER CLAIM ON THE GROUND THAT PETITIONER WAS A VORTEX PUBLIC FIGURE

After petitioner was discharged from her employment her supervisor, the city engineer, stated to the director of public works of another city that he had gotten rid of their chemist because she was incompetent. There was no doubt that petitioner was the object of his comment; nor was there any doubt about petitioner's competence. In fact, respondents took the position that petitioner did quit her employment because the position of chemist was abolished and she refused lesser employment. Petitioner had sued the City and Respondent Garrett because of this *per se* defamation. The trial court granted a directed verdict

on the slander claim on the ground that petitioner had thrust herself into the public through news articles appearing in the local newspaper.

The court of appeals affirmed the lower court's holding that petitioner was a vortex public figure, having met the "limited purpose public figure test" of *Trotter* v. *Jack Anderson Enterprises*, 818 F.2d 431 (5th Cir. 1987).[3] The lower courts based their decisions on seven newspaper stories appearing in a local newspaper from December 18, 1983, to February 8, 1985. Though neither opinion referred to an exhibit by number, it must be understood that the reference is to Exhibit No. D-53 which was marked for identification. Thus, the evidence relied on by both courts was never admitted into evidence.[4] Nevertheless, the newspaper articles do not support the third prong of the *Trotter* test nor the standard announced by this Court in *Dun and Bradstreet* v. *Greenmoss Builders*, 472 U.S. 749, 86 L.Ed.2d 593, 105 S.Ct. 2939 (1985). The defamation must be germane to the plaintiff's participation in the controversy in order for her to become a vortex public figure.

The Court of Appeals recognized that the statement forming the basis for Mrs. Loftin-Boggs' state law standard claim was uttered in May of 1984. Of the seven articles, two were published after that date. Those could

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[3] Though petitioner was a public employee, she was not a public figure. She was at a level of responsibility three tiers below the city manager who was the chief executive officer. See, e.g. *Connick* v. *Myers*, 461 U.S. 138 (1983).

[4] It is submitted that the courts could not properly rely on matters not entered into evidence. See, e.g. *U. S.* v. *Gurley*, 415 F.2d 144, 147 (5th Cir. 1969).

not serve as the basis for the Court's vortex public figure analysis of the lower courts.

The article dated March 13, 1984, did not mention petitioner nor make any reference whatsoever to any controversy which she might have had with the City of Meridian. Similarly, the article dated March 25, 1984, neither mentioned petitioner nor did it make any reference to her discharge from the City.

The article dated April 3, 1984, reported the accusation by petitioner that the City of Meridian was breaking the law and losing money by not requiring local firms to test their water before dumping it into the City sewer system. The only reference to sex discrimination was the statement that "Mrs. Boggs, who is reportedly filing a sex discrimination lawsuit against the City, said she 'was told the citizens of Meridian would not want us to approach these industries.'" This is not a statement by petitioner nor is it a quote of hers concerning her treatment as a female. Of course, petitioner did not file her lawsuit until January of 1985.

The December 18, 1983, article did not quote petitioner but rather the attorney who was representing her at that time. The article stated that her attorney was in the preliminary stages of investigation to determine whether a suit would be filed against the City of Meridian. The suit was not filed until over a year later.

All of these stories were written by either George Duncan or Billy Vaughn. Both reporters testified by deposition at the trial. Mr. Vaughn testified that he did not talk to petitioner until after she left her employment with the City. Mr. Duncan testified that he had no contact with petitioner while she was employed with the City and that the only contact he had with her was not personal in

nature or in description of a disagreement which petitioner might have had but rather "they were more technical in nature." In other words, his contract with her concerned her expertise as a chemist familiar with the wastewater treatment activities of the city.

The articles themselves nor the testimony of the reporters that actually wrote the articles fail to support the third prong of the test that the defamation be germane to petitioner's participation in the controversy. Moreover, none of the news articles contained any evidence that petitioner was attempting to influence the views of others on the matter which was the subject of the slander. The defamation was that she had been fired because she was incompetent. That has absolutely nothing to do with either her charge of discrimination or sexual harassment or any controversy that she might have had over mismanagement of the wastewater treatment of the City of Meridian. See *Hutchinson* v. *Proxmire*, 443 U.S. 111, 135 (1979).

The court of appeals suggested that after Loftin-Boggs initiated the lawsuit, she used the media to make sure that her point of view reached the public. See, *Slip. Op*, at pp. 7 and 8. (Ap. 7a) There is simply no evidence in the record that after her lawsuit was filed, which was substantially after the defamation, did she seek any immediate attention or have any contact whatsoever with the media.

CONCLUSION

Petitioner respectfully requests that the writ be granted and that this cause be summarily reversed and remanded to the United States Court of Appeals for the Fifth Circuit with instructions to review the sex discrimination claims raised under Title VII of the Civil Rights Act of 1964 by petitioner. Petitioner further requests that the writ be granted and the common law/slander claim of the petitioner be remanded to the district court for trial.

Respectfully submitted,

ANITA KAYE LOFTIN-BOGGS,
Petitioner

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APPENDIX

APPENDIX

1. Notice of Appeal 1a
2. Order of the Court of Appeals (July 10, 1987) 2a
3. Order of the Court of Appeals denying rehearing and suggestion for rehearing en banc (September 17, 1987 ..... 8a

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF MISSISSIPPI
EASTERN DIVISION

CIVIL ACTION NO. E85-0011(L)

ANITA KAYE LOFTIN-BOGGS,

Plaintiff,

v.

CITY OF MERIDIAN, MISSISSIPPI, JAMES L. GARRETT, SR., Individually and as City Engineer and Director of Public Works, NEAL CARSON, Individually and as Assistant Director of Public Works,

Defendants.

FILED
July 16 1986
Clarence A. Pierce, Clerk

NOTICE OF APPEAL

Notice is hereby given that Anita Kaye Loftin-Boggs, plaintiff in the above entitled and numbered civil action, hereby appeals to the United States Court of Appeals for the Fifth Circuit from the Memorandum Opinion and Order dated June 17, 1986.

This 16th day of July 1986.

Respectfully submitted,

/s/_____
ANITA KAYE LOFTIN-BOGGS
Plaintiff

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 86-4511
Summary Calendar

ANITA KAYE LOFTIN-BOGGS,
Plaintiff-Appellant,

v.

CITY OF MERIDIAN, MISSISSIPPI, JAMES L. GARRETT, SR., Individually and as City Engineer and Director of Public Works, NEAL CARSON, Individually and as Assistant Director of Public Works,
Defendants-Appellees.

Appeal From The United States District Court
For The Southern District of Mississippi
(CA-E85-0011(L))

(July 10, 1987)

Before REAVLEY, JOHNSON, and DAVIS, Circuit Judges.
JOHNSON, Circuit Judge:[1]

Anita Kaye Loftin-Boggs, a chemist formerly employed by the City of Meridian, Mississippi, sued the City and her supervisors for sex discrimination, civil rights violations, and state law slander. Having lost on all her claims, Loftin-Boggs

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[1] Local Rule 47.5 provides: "The publication of opinions that have no precedential value and merely decide particular cases on the basis of well-settled principles of law imposes needless expense on the public and burdens on the legal profession." Pursuant to that Rule, the court has determined that this opinion should not be published.

appealed only the district court's directed verdict on the slander claim. For the reasons outlined below, we affirm.

I. BACKGROUND

The City of Meridian hired Loftin-Boggs to work as a chemist in its Public Works Department in 1980. Loftin-Boggs worked under Neal Carson, the Assistant Director of Public Works, and James L. Garrett, the City Engineer and Director of Public Works. Loftin-Boggs had both personal and policy conflicts with Garrett. For example, Loftin-Boggs advocated strict enforcement of the City sewer ordinance to reduce the strain on the City's wastewater treatment plant and to produce revenue from testing. Garrett opposed stricter enforcement on the ground that it would burden small business. In 1983, Loftin-Boggs filed a grievance against Garrett, charging that Garrett used sexually abusive language toward her and excluded her from staff meetings. Garrett, in turn, accused Loftin-Boggs of falsifying time sheets, failing to complete water-pollution reports, and creating conflicts with other staff. City Manager Richard Burnett attempted to smooth over the differences and directed Garrett to include Loftin-Boggs in future staff meetings.

The Meridian water treatment system, which had been operating under a temporary permit, received a permanent permit in 1984. Arguing that, under the new permit, water testing could be carried out by a laboratory technician, the City Manager proposed that Loftin-Boggs' chemist position be downgraded and her salary reduced by $4,000. The City Council adopted this recommendation in December 1983, and Loftin-Boggs resigned, citing the downgrading, the same day.

In May 1984, Garrett, while at a professional convention, told R.C. Randall, a Commissioner of the City of Gulfport, Mississippi, "'We had to let a chemist go at the treatment plant because of incompetency.'" Record Vol. 5 at 502-03. This statement forms the basis for Loftin-Boggs' state law slander claim.

In January 1985, Loftin-Boggs sued the City of Meridian, Burnett, and Garrett for sex discrimination under Title VII of the Civil Rights Act of 1964, for violation of her civil rights under 42 U.S.C. §§ 1983 and 1985(3), and for state law slander. Loftin-Boggs later dropped the charges against Burnett and added Carson as a defendant. The district court entered a directed verdict against Loftin-Boggs on her slander claim, holding that Loftin-Boggs was a public figure and had not produced evidence of "actual malice" on Garrett's part. *New York Times Co.* v. *Sullivan*, 376 U.S. 254, 84 S. Ct. 710, 11 L. Ed. 2d 686 (1964). The jury found against Loftin-Boggs on her section 1983 claim. On April 24, 1986, the district court entered a "partial judgment" on the section 1983 and slander claims. Trial on the Title VII claims was to the district court, which issued an opinion on May 2, 1986, finding that Loftin-Boggs had failed to meet her burden of proof. On May 8, 1986, the trial court entered a final judgment on all the claims. Loftin-Boggs moved for judgment n.o.v. or a new trial on *the section 1983 and slander claims;* the district denied this motion in an order dated June 17, 1986. On July 16, 1986, Loftin-Boggs filed a notice of appeal "from the Memorandum Opinion and Order dated June 17, 1986." Since the June 17, 1986, order covered *only* the section 1983 and slander claims, this Court granted Meridian's motion to dismiss Loftin-Boggs' appeal of her Title VII claims. Loftin-Boggs has disclaimed any intention to appeal the jury's verdict on her section 1983 claims. Appellant's Brief at 2. Hence, only the pendent slander claim is at issue on this appeal.

II. DISCUSSION

Under both Mississippi and federal constitutional law, a "public figure" slander plaintiff must prove that a defendant spoke with "actual malice." *New York Times Co.*, 376 U.S. 254, 84 S. Ct. 710; *Trotter* v. *Jack Anderson Enterprises, Inc.*, No. 86-2542, slip op. at 4318 (5th Cir. June 5, 1987); *Ferguson* v. *Watkins*, 448 So. 2d 271 (Miss. 1984). The question of whether the plaintiff is a public figure is ordinarly reserved for the trial

court, and Loftin-Boggs and the City point to no considerations that would counsel a departure from that rule in the instant case. *Rosenblatt* v. *Baer*, 383 U.S. 75, 76, 88, 86 S. Ct. 669, 671, 677, 15 L. Ed. 2d 597 (1966); *Brewer* v. *Memphis Pub. Co., Inc.*, 626 F.2d 1238, 1247 and n.13 (5th Cir. 1980), *cert. denied*, 452 U.S. 962, 101 S. Ct. 3112, 69 L. Ed. 2d 973 (1981). Loftin-Boggs also does not attack the validity of the district court's conclusion that, if she is a public figure, she did not present enough evidence of actual malice to reach the jury. Our discussion, then, is limited to whether the district judge was correct, as a matter of law, in determinating that Loftin-Boggs was a public figure.

A "vortex public figure" or "limited purpose public figure" is a person who, while not a public figure for all purposes, has become so involved in a particular public controversy that it is fair to require him to meet the *New York Times* standard in suits over speech concerning that controversy. *Wolston* v. *Readers' Digest Ass'n, Inc.*, 443 U.S. 157, 164-65, 99 S. Ct. 2701, 2706, 61 L. Ed. 2d 450 (1979). This Court has recently adopted a test for limited-purpose public figures borrowed from the D.C. Circuit:

> (1) The controversy at issue must be public both in the sense that people are discussing it and people other than the immediate participants in the controversy are likely to feel the impact of its resolution; (2) the plaintiff must have more than a trivial or tangential role in the controversy; and (3) the alleged defamation must be germane to the plaintiff's participation in the controversy.

Trotter, slip op. at 4320 (footnote omitted), *citing Tavoulareas* v. *Washington Post Co.*, No. 83-1604 (March 13, 1987) (en banc).

At trial, Loftin-Boggs called two reporters from the Meridian Star, William Vaughn and Georg Duncan, who testified that Loftin-Boggs met with them over a hundred times to provide them with information and documents. The trial records contains seven newspaper stories, dated December 18, 1983, to February 8, 1985, about Loftin-Boggs' sex discrimination

charges and her accusation that the City was mismanaging its wastewater system. Loftin-Boggs testified that she also talked to a local television reporter and gave reporters copies of her Equal Employment Opportunity Commission and court papers.

Applying the *Trotter* test, it appears that the citizens of Meridian had a legitimate public interest in knowing whether their Public Works Department was mismanaging its wastewater treatment program and discriminating against its female employees. Loftin-Boggs was at the center of that controversy because she had protested the decision not to strictly enforce the pollution ordinances, had been constructively discharged, and had brought a sex discrimination suit. Moreover, Loftin-Boggs' own evidence shows that she actively sought and obtained media access in order to tell "her side" of the controversy. Garrett's alleged statement to Randall concerned the same controversy; by claiming that Loftin-Boggs was fired for incompetence, Garrett denied that she was fired because of her sex or views. In sum, Loftin-Boggs meets the *Trotter* public-figure test. The facts of the instant case also bear a strong resemblance to those of *Ferguson* v. *Watkins*, in which the Mississippi Supreme Court held that doctors employed by a public hospital, who had engineered the controversial discharge of the hospital administrator, were "vortex public figures" under that state law doctrine. 448 So. 2d at 277-79.

Loftin-Boggs argues, however, that she entered the public arena involuntarily, as a result of wrong done to her by the City and the individual defendants, and only to defend herself. Loftin-Boggs points to *Whitten* v. *Commercial Dispatch Publishing Co., Inc.*, in which the Mississippi Supreme Court held that three men convicted of transporting cattle without proper disease testing could recover from a newspaper which falsely stated that the three were convicted of cattle theft. 487 So. 2d 843 (Miss. 1986). The Mississippi Supreme Court emphasized that the *Whitten* plaintiffs had done no more than plead guilty, in court, to misdemeanor charges, and that this involvement was "against their will." *Id.* at 845. By contrast, Loftin-Boggs

initiated a suit against Meridian and some of its officials and actively used the media to make sure that her point of view reached the public. It is true that Loftin-Boggs' suit was in turn sparked by the City's allegedly illegitimate act of discharging her. But the justice or injustice of Loftin-Boggs' position in the underlying controversy is not relevant to the question of whether it *was* a truly public controversy and whether Loftin-Boggs "thrust [herself] to the forefront" of that controversy "in order to influence the resolution of the issues involved." *Gertz* v. *Robert Welch*, 418 U.S. 323, 345, 94 S. Ct. 2997, 3009, 41 L. Ed. 2d 789 (1974). Nor is this a case where a libel defendant himself publicizes the plaintiff's affairs and then argues that this self-created publicity should allow him to invoke *New York Times*. *Hutchinson* v. *Proxmire*, 443 U.S. 111, 135, 99 S. Ct. 2675, 2688, 61 L. Ed. 2d 411 (1979). The record in the instant case indicates that Loftin-Boggs sought press coverage for her grievances and the news media—third parties—granted that coverage because the controversy appeard newsworthy. Loftin-Boggs therefore meets the limited-purpose public figure test.[2]

Because Loftin-Boggs does not dispute the district court's actual-malice ruling, and because the other issues decided at trial are not covered by this appeal, we AFFIRM the judgment of the district court.

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[2] The City and Garrett also argue that Garrett's statement cannot constitute slander because Garrett did not refer to Loftin-Boggs by name. Mississippi law clearly provides that a defamatory statement need not expressly mention the plaintiff, so long as the plaintiff can be reasonably identified as the subject of the statement. Krebs v. McNeal, 76 So. 2d 693, 701 (Miss. 1955). Loftin-Boggs was the only chemist employed at the Meridian wastewater treatment plant. Even if Randall did not know of Loftin-Boggs' identify at the time he heard Garrett's remark, Randall could certainly be expected to put two and two together if, for example, Loftin-Boggs ever applied for a job in Gulfport. Therefore, we reject this argument.

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 86-4511

ANITA KAYE LOFTIN-BOGGS,
Plaintiff-Appellant,

v.

CITY OF MERIDIAN, MISSISSIPPI,
JAMES L. GARRETT, SR.,ETC., ET AL.,
Defendants-Appellees.

Appeal From The United States District Court
For The Southern District of Mississippi

FILED
Sep 17 1987

ON PETITION FOR REHEARING AND SUGGESTION FOR REHEARING EN BANC

(Opinion July 10, 1987, 5 Cir., 198_, _____ F.2d ____)

(September 17, 1987)

Before REAVLEY, JOHNSON, and DAVIS, Circuit Judges.

PER CURIAM:

(✓) The Petition for Rehearing is DENIED and no member of this panel nor Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc, (Federal Rules of Appellate Procedure and Local Rule 35) the Suggestion for Rehearing En Banc is DENIED.

( ) The Petition for Rehearing is DENIED and the Court having been polled at the request of one of the members of the Court and a majority of the Circuit Judges who are in regular active service not having voted in favor of it, (Federal Rules of Appellate Procedure and Local Rule 35) the Suggestion for Rehearing En Banc is also DENIED.

( ) A member of the Court in active service having requested a poll on the reconsideration of this cause en banc, and a majority of the judges in active service not having voted in favor of it, rehearing en banc is DENIED.

ENTERED FOR THE COURT:

/s/_____
United States Circuit Judge
9-8-87

CLERK'S NOTE:
SEE FRAP AND LOCAL
RULES 41 FOR STAY OF THE
MANDATE

87-971

Supreme Court, U.S.
FILED
DEC 21 1987
JOSEPH F. SPANIOL, JR.
CLERK

No. 87-

IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

ANITA KAYE LOFTIN-BOGGS,

Petitioner,

v.

CITY OF MERIDIAN, MISSISSIPPI, JAMES L. GARRETT, SR., Individually and as City Engineer and Director of Public Works, and NEAL CARSON, Individually and as Assistant Director of Public Works,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

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SUPPLEMENTAL APPENDIX

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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF MISSISSIPPI
EASTERN DIVISION

Civil Action No. E85-00011(L)

ANITA KAYE LOFTIN-BOGGS,

Plaintiff,

v.

CITY OF MERIDIAN, MISSISSIPPI; RICHARD BURNETTE, Individually and as City Manager; JAMES L. GARRETT, SR., Individually and as City Engineer and Director of Public Works; and NEAL CARSON, Individually and as Assistant Director of Public Works,

Defendants.

TRANSCRIPT OF TRIAL

Trial Held On April 14, 15, 16, 17, 18 And 21, 1986, In Meridian, Mississippi, Before The Honorable Tom S. Lee, United States District Judge, And A Jury.

VOLUME V

APPEARANCES:

For the Plaintiff:

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Jackson, Mississippi 39205

For the Defendants:

Mr. James A. Becker, Jr.
Watkins & Eager
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Jackson, Mississippi 39205

question to writing, signed by the foreman or forewoman, and pass the note to the Marshal, who will bring it to my attention. I will then respond as promptly as possible, either in writing or by having you return to the courtroom in order that I can address you personally.

I caution you, however, with respect to any message or question you might send, that you should never state nor specify your numerical division at that time.

There is one additional matter now that I must take up with the lawyers before you retire to consider your verdict. The Marshal will accompany you now to the juryroom for a few minutes and you will be returned shortly. [THE JURY LEFT THE COURTROOM AT 3:06 P.M.]

BY THE COURT: Does the plaintiff have any objections to the instructions given by the Court, or do you have any additional instructions to request?

BY MR. MAXEY: May it please the Court, the plaintiff does not have any objections to the instructions given. The plaintiff requests that Instruction No. 5 for the plaintiff be given.

BY THE COURT: At the close of the plaintiff's evidence the Court took under advisement the defendants' motion for a directed verdict with reference to the slander claim. Instruction No. [1139] 5 is an instruction with reference to the claim of slander. Of course, implicit in the instructions that I gave was the indication that the motion was sustained. Under the case of *New York Times* v. *Sullivan* liability may not be imposed or otherwise actionable libel of a public figure unless the statements in

issue were made with knowledge of their falsity or in reckless disregard of whether they are true or false.

Recent Mississippi law in the case of *Ferguson* v. *Watkins*, interpreting *Sullivan*, recognizes a vortex public figure, one who is otherwise a private figure but who thrusts herself or becomes thrust into the vortex of a matter of legitimate public interest.

At the time Garrett made the allegedly slanderous statement to Randall, approximately in May of 1984, the plaintiff's situation had been the subject of at least four newspaper articles. When Garrett made the allegedly slanderous statement to the reporter, he was responding to statements made by the plaintiff in an article about her. Publicity alone, however, may not be sufficient to convert the plaintiff from a private individual to a public figure.

Here, however, the Court is of the opinion that plaintiff prompted the publicity by contacting reporters, thereby thrusting herself into a position as a public figure. The Court, therefore, concludes that the plaintiff is a public figure and is subject to the proof requirements as set out [1140] in *New York Times* v. *Sullivan*.

Consequently, I am marking Instruction No. 5 for the plaintiff "Refused" and handing it to the Court Reporter for insertion in the record, and, as I stated, the Court grants a directed verdict on the slander charge.

Do you request any additional instructions?

BY MR. MAXEY: No, we do not, Your Honor.

BY THE COURT: Do the defendants have any objections to the instructions or offer any additional instructions?

BY MR. BECKER: No, Your Honor. We had filed a request for a directed verdict on all issues as Instruction No. D-1, and I believe the Court has, by inference, already overruled that.

BY THE COURT: All right, sir. I am marking that Instruction No. 1 for the defendants "Refused" and having it inserted in the record.

BY MR. BECKER: And, Your Honor, so that the record will be clear, we also note that the—even though it is contained in the pretrial order and otherwise—that the plaintiff has withdrawn the requested instructions insofar as punitive damages were concerned.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF MISSISSIPPI
EASTERN DIVISION

Civil Action No. E85-00011(L)

ANITA KAYE LOFTIN-BOGGS,

Plaintiff,

v.

CITY OF MERIDIAN, MISSISSIPPI; RICHARD BURNETTE, Individually and as City Manager; JAMES L. GARRETT, SR., Individually and as City Engineer and Director of Public Works; and NEAL CARSON, Individually and as Assistant Director of Public Works,

Defendants.

INSTRUCTION NO. 5 FOR THE PLAINTIFF

If you find from a preponderance of the evidence in this case that the defendant Jim Garrett told R. C. Randall orally that:

1. "That they had let go a chemist who had worked in the water and sewer department because of incompetency," or substantially similar words, and it could reasonably be inferred that defendant Garrett was referring to the plaintiff and

2. These words accused plaintiff of conduct which will harm her business as a professional chemist, then your verdict shall be for the plaintiff.

However, if you believe that the plaintiff Anita Kaye Loftin-Boggs has failed to prove any of these elements by a preponderance of the evidence in this case, then your verdict shall be for the defendants.

Natchez Times Publishing Co. v. *Dunigan*, 72 So.2d 681 (1954); *Taylor* v. *Standard Oil Co.*, 186 So. 294 (1939)

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF MISSISSIPPI
EASTERN DIVISION

Civil Action No. E85-00011(L)

ANITA KAYE LOFTIN-BOGGS,

Plaintiff,

v.

CITY OF MERIDIAN, MISSISSIPPI; RICHARD BURNETTE, Individually and as City Manager; JAMES L. GARRETT, SR., Individually and as City Engineer and Director of Public Works; and NEAL CARSON, Individually and as Assistant Director of Public Works,

Defendants.

Filed Apr 28 1986

PARTIAL JUDGMENT

This action came on for trial before the Court and a jury, Honorable Tom S. Lee, District Judge, presiding, and all the issues pursuant to the Civil Rights Act of 1871, 42 U.S.C. § 1983, the Civil Rights Act of 1861, 42 U.S.C. § 1985, and all pendant state claims, having been duly tried and the Court having taken under advisement all of the claims pursuant to Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e, and all claims for relief for alleged sexual harassment and discrimination, and the plaintiff having moved to dismiss the defendant, Richard Burnette, individually and as City Manager during the course of these proceedings, and the Court having sus-

tained that Motion to Dismiss with Prejudice as to said defendant; the jury duly rendered its verdict in favor of all remaining defendants, City of Meridian, Garrett and Carson.

IT IS, THEREFORE, ORDERED AND ADJUDGED, that the plaintiff take nothing, that the action be dismissed on its merits, except to those claims arising under 42 U.S.C. § 2000e which the Court has taken under advisement, and that the defendants, City of Meridian, Mississippi, Richard Burnette, individually and as City Manager, James L. Garrett, Jr., individually as City Engineer and Director of Public Works and Neal Carson individually and as Assistant Director of Public Works, recover of the plaintiff, Anita Kaye Loftin-Boggs, their costs of action.

So ordered, this the 24th day of April, 1986.

/s/_____
UNITED STATES DISTRICT JUDGE

APPROVED AS TO FORM:

CUPIT & MAXEY

BY: /s/ John L. Maxey, II
JOHN L. MAXEY, II

WATKINS & EAGER

BY: /s/ James A. Becker, Jr.
JAMES A. BECKER, JR.

UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF MISSISSIPPI
EASTERN DIVISION

Civil Action No. E85-00011(L)

ANITA KAYE LOFTIN-BOGGS,

Plaintiff,

v.

CITY OF MERIDIAN, MISSISSIPPI; RICHARD BURNETTE, Individually and as City Manager; JAMES L. GARRETT, SR., Individually and as City Engineer and Director of Public Works; and NEAL CARSON, Individually and as Assistant Director of Public Works,

Defendants.

Filed May 4 1986

MEMORANDUM OPINION

This cause came before the court on the complaint of the plaintiff, Anita Kay Loftin-Boggs, charging that the defendants, James L. Garrett, Sr., individually and as city engineer and director of public works, Neal Carson, individually and as assistant director of public works, and the City of Meridian, Mississippi[1] (City) violated Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. §

[1] At trial, plaintiff moved to dismiss Richard Burnette, individually and as city manager of Meridian, as a defendant. That motion was granted without objection by defendants.

2000(e), *et seq.*[2] Based on testimony and exhibits presented at trial, this court makes the following findings of fact and conclusions of law.

Plaintiff, Anita Kay Loftin-Boggs, was hired by the City to work as a chemist in the public works department. Her responsibilities initially included supervision of the wastewater treatment plant laboratory and were later expanded to include testing for the fresh water plant. The City was required to test the water after treatment at the plant. The test results were reported to the Mississippi Bureau of Pollution Control according to the terms of the City's operating permit and to the plant operator for his use in running the plant. During plaintiff's tenure with the City, she was assisted by either one or two lab technicians. When plaintiff was hired, the City was in the process of building a new wastewater treatment plant and was operating under a temporary permit until completion of the new plant at which time the City was required to comply with a more stringent permanent permit. Under the hierarchy of the department, plaintiff reported to Tom Childress, environmental engineer, who, along with Leroy Brodway, the plant operator, reported to James Garrett, director of public works.

During the first year of plaintiff's employment, all apparently went well at the wastewater treatment plant. Plaintiff participated in and even initiated some of the crude language and storytelling that was already preva-

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[2] Plaintiff's complaint also alleged causes of action under state common law and 42 U.S.C. §§ 1983 and 1985. The statutory claims were heard by a jury which returned a verdict for defendants. The court granted a directed verdict in favor of defendants on the common law claims.

lent in the department.[3] Almost every witness who worked in the department admitted to taking part in the vulgarities. Plaintiff and her superior, Tom Childress, developed a close friendship which became the subject of much speculation. Plaintiff and Childress were aware of the perceived nature of their relationship but neither attempted to quell the rumors. In fact, plaintiff gave credence to the gossip by making jokes about "screwing the boss."

In 1982, plaintiff consulted the city's personnel director, June Pieschel, regarding the use of the grievance procedure to complain about James Garrett's behavior toward plaintiff. According to plaintiff, Garrett made derogatory remarks about women, sexually propositioned plaintiff and other women, and excluded plaintiff from professional meetings because of her sex. Plaintiff's relationship with Garrett was aggravated at least in part by their conflicting views on enforcement of the City's sewer use ordinance. Under the ordinance, users could be charged according to the nature of waste deposited in the system. Plaintiff was of the opinion that enforcement would reduce residential sewage bills and would provide substantial revenue to the City from laboratory fees charged to industries for testing. According to Garrett, enforcement of the ordinance would unduly burden small businesses. He also disagreed with plaintiff's estimates of anticipated revenue from testing and saw her efforts relating to the ordinance as a plan to enlarge her staff and develop and empire in the wastewater treatment plant. In

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[3] Plaintiff testified that at some point, she decided that the language and atmosphere of the department were offensive to her and asked her co-workers to refrain from their use of crude language. She thereafter responded with more crude language of her own.

the presence of her co-workers, plaintiff displayed her displeasure with Garrett, Burnette and Carson by making sexually explicit gestures and by referring to them by foul names. Pieschel advised against filing a grievance and plaintiff refrained.

Plaintiff's relationship with Garrett worsened and in May 1983, she did file a grievance. Plaintiff therein recounted two incidents, one in which Garrett had allegedly wrongfully accused her of failing to comply with proper purchase order procedures and one in which Garrett excluded her from a meeting at a local hotel and reprimanded her publicly when she appeared. Plaintiff further stated that she was excluded from staff meetings. In summary, plaintiff stated:

> I request the professional treatment due anyone who would hold my position or one similar with the city; I request to not be threatened, not to be talked to abusively, not to be accused unjustly, and that any disciplinary actions occur in the appropriate manner. I request to be included in any job related staff meetings.

Richard Burnette, city manager, held a hearing on the grievance and concluded that "the basic cause of these problems is the unintentional conflict of personalities of two very bright professionals." He ruled that plaintiff was entitled to courteous and professional treatment by all city employees and was to be included in staff meetings. Garrett wrote to Burnette in response to the ruling, stating that plaintiff was a disruptive element in the department and was the subject of many complaints involving improper purchase orders and use of city time to work on personal business ventures.

Resolution of the grievance did little to improve matters. Plaintiff was thereafter invited to staff meetings.

She declined to attend all but one which she left when her steak was not cooked to her satisfaction. Plaintiff also developed a friendship with the Mayor of Meridian and approached him with her complaints against Garrett. By this time, plaintiff had become derelict in her job responsibilities. Her lab technician and Leroy Broadway, plant operator, testified that plaintiff would volunteer to work on holidays and weekends and then fail to perform the tests but would claim compensation for that time. Her failure to perform the tests caused the required reports to be incomplete and inaccurate. Plaintiff's co-workers hesitated to bring her shortcomings to the attention of her superior, Tom Childress, because of the rumors surrounding their relationship. Garrett also testified that he discovered errors in plaintiff's timecards and that he was informed that an important report for which plaintiff had been responsible was not submitted as required to the Mississippi Bureau of Pollution Control. He further stated that plaintiff made unauthorized and personal long distance phone calls on city telephones.

In November 1983, Garrett considered the possibility of firing the plaintiff. He contacted a lawyer for the City who informed him that the proposed reasons for termination, unauthorized use of city telephones, inaccurate testing and falsified timecards,[4] were too old to constitute sufficient grounds. Garrett then contacted Dr. Adnan Shindala, the City's consulting engineer, concerning the staff requirements of the lab under the permanent permit which would be issued in 1984. Shindala advised that a chemist was not required to perform the tests under the

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[4] At trial, plaintiff denied all of these charges and the court does not rule on whether they are true or whether they alone would have been proper grounds for her termination.

new permit. Plaintiff was made aware of these developments by Childress and Pieschel.[5] Thereafter, Burnette and Garrett presented to the city council a proposed reorganization of the lab. Under the plan, the chemist position would be reclassified as laboratory technician II with a lower pay grade, and would be supervised by the plant operator rather than the environmental engineer. The plan was approved and thereafter plaintiff resigned.

Plaintiff contends that defendants' actions constituted sexual harassment. Every circuit presented with the issue has held that sexual harassment may constitute employment discrimination under Title VII. *See, e.g.*, *Henson* v. *City of Dundee*, 682 F.2d 897, 908-09 (11th Cir. 1982); *Miller* v. *Bank of America*, 600 F.2d 211, 213 (9th Cir. 1979); *Tompkins* v. *Public Service Electric and Gas Co.*, 568 F.2d 1044, 1048-49 (3rd Cir. 1977); *Barnes* v. *Costle*, 561 F.2d 983, 990-91 (D.C. Cir. 1977); *Garber* v. *Saxon Business Products, Inc.*, 552 F.2d 1032, 1032 (4th Cir. 1977). In *Simmons* v. *Lyons*, 746 F.2d 265, 270 (5th Cir. 1984), the Fifth Circuit stated that it had never expressly ruled on the issue but could perceive no reason it would reach a contrary conclusion.

Pursuant to its authority to promulgate regulations necessary to carry out its responsibilities, the Equal Employment Opportunity Commission has stated that under certain circumstances sexual harassment may be violative of Title VII.[6] 29 C.F.R. § 1604.11 provides in part:

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[5] Pieschel apparently spoke to plaintiff both as a friend and as personnel director at the request of Burnette.

[6] The United States Supreme Court has held that EEOC regulations are "entitled to great deference" by courts. *See Albemarle Paper Co.* v. *Moody*, 422 U.S. 405, 431 (1975).

> (a) Harassment on the basis of sex is a violation of Sec. 703 of Title VII. Unwelcome sexual advances, requests for sexual favors, and other verbal or physical conduct of a sexual nature constitute sexual harassment when (1) submission to such conduct is made either explicitly or implicitly a term or condition of an individual's employment, (2) submission to or rejection of such conduct by an individual is used as the basis for employment decisions affecting such individual, or (3) such conduct has the purpose or effect of unreasonably interfering with an individual's work performance or creating an intimidating, hostile, or offensive working environment.
>
> (b) In determining whether alleged conduct constitutes sexual harassment, the Commission will look at the record as a whole and at the totality of the circumstances, such as the nature of the sexual advances and the context in which the alleged incidents occurred. The determination of the legality of a particular action will be made from the facts, on a case by case basis. [footnote omitted]

In *Henson* v. *City of Dundee*, 682 F.2d 897, 903-04 (11th Cir. 1982), the Eleventh Circuit set out the elements to be established by a plaintiff claiming that sexual harassment creates a hostile environment in violation of Title VII:[7]

1. The employee belongs to a protected class;

2. The employee was subject to unwelcome sexual harassment;

---

[7] *Henson* also sets out the element of proof for a claim of *quid pro quo* sexual harassment, in which the employee suffers damage because of a refusal to engage in sexual relations with a superior. *See* 682 F.2d at 908-09. While questions regarding one's availability for sexual relations were common at the wastewater treatment plant, it is apparent that such questions were merely tasteless and flaccid attempts at humor.

3. The harassment complained of was based on sex;

4. The harassment complained of effected a "term, condition, or privilege" of employment; and

5. Requirements of respondeat superior if applicable.

Here plaintiff's proof clearly fails on the second element and consideration of the other criteria is not necessary. Despite plaintiff's testimony, she certainly failed to relate to any of her supervisors or co-workers that she found the alleged sexual harassment to be embarassing, humiliating or generally unwelcomed.[8] Plaintiff admitted at trial that she cursed and used vulgar language while at work. According to the testimony of her co-workers, plaintiff often made jokes about sex and participated in frequent discussions and bantering about sex. Any harassment plaintiff received relating to her relationship with Childress was prompted by her own actions, including her tasteless joking. Considering plaintiff's contribution to and apparent enjoyment of the situation, it cannot be said that the defendants created "an intimidating, hostile, or offensive working environment." Additionally, the EEOC regulations provide that the Commission will consider "the nature of the sexual advances and the context in which the alleged instances occurred." The context presented here is one of the vulgar and unprofessional con-

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[8] Plaintiff's participation in the conduct leading to the creation of the alleged hostile environment does not permanently bar a successful claim of sexual harassment. Once here participation is established, however, she must be able to identify with some precision a point at which she made known to her co-workers or superiors that such conduct would hencefore be considered offensive. Plaintiff's grievance may have conveyed this information but the evidence did not show that her conduct or her reaction to others' conduct changed subsequently.

duct by all, including plaintiff. While the situation was certainly not an effective working environment, it also was not the hostile environment prohibited by Title VII.

The order of proof in a Title VII disparate case is well established. In *McDonell Douglas Corp.* v. *Green*, 411 U.S. 792 (1973), the United States Supreme Court held that a plaintiff has the initial burden of proving a prima facie case. The defendant then must articulate a legitimate reason for the discharge. The plaintiff then bears the burden of showing by a preponderance of the evidence that the reasons stated by the defendant are mere pretext for intentional discrimination. *Id.* The ultimate factual inquiry in such a case remains whether the defendants intentionally discriminated against the plaintiff. *United States Postal Service Board of Governors* v. *Aikens*, 460 U.S. 711 (1984).

To establish a prima facie case, the plaintiff must show:

(1) that she was a member of a protected class;

(2) that she was qualified for her position;

(3) that she was discharged; and

(4) that she was replaced by a male.

Id. at 802.

Plaintiff is a female and is, therefore, a member of the protected class. She also showed that she was performing her work in a generally satisfactory manner when discharged[9] and that her reclassified position was filled by a male.

---

[9] Plaintiff established that she was qualified for purposes of her prima facie case even though the court ultimately determines that her performance was not satisfactory in certain respects.

Plaintiff contends that she was constructively discharged when her position as chemist was abolished by the city council in December 1983. Under the law of the Fifth Circuit, "to find a constructive discharge, the court determines whether or not a reasonable person in the employee's position would have felt compelled to resign." *Shawgo* v. *Spradlin*, 701 F.2d 470, 481 n.12 (5th Cir.), *cert. denied sub. nom*, *Whisenhunt* v. *Spradlin*, 464 U.S. 965 (1983). *See also Kelleher* v. *Flawn*, 761 F.2d 1079, 1086 (5th Cir. 1985). Under the facts presented here, the court must conclude that plaintiff was constructively discharged. Plaintiff had heard from reliable sources that her job was in jeopardy. When she learned of the abolition of her position, no mention was made of her status or the possibility of her moving to the new position. Additionally, the laboratory technician II position had a substantially lower salary than that of chemist.

Defendants argue that plaintiff's position was abolished as part of a restructuring of the wastewater treatment plant. Defendant's argument is supported by the testimony of Dr. Shindala who testified that the reclassification was permissible under the plant's operating permit. The permanent permit did require more tests but, according to Shindala, they could be successfully performed by his seventeen-year-old daughter. The two lab technicians now employed by the City have substantially more education than that and perform the necessary work satisfactorily. The defendants also contend that the reclassification was necessary to restructure the hierarchy within the plant. When plaintiff was hired, she was supervised by Tom Childress, the environmental engineer, and yet her work was primarily utilized by the plant operator. The laboratory technican II is now appropriately under the supervision of the plant operator. Before the council's

action, the chemist was paid more than the plant operator. When the chemist position was reclassified to laboratory technician II, the salary was altered to reflect the respective roles.

Plaintiff contends that the reason articulated by defendants is mere pretext. According to plaintiff, the reclassification plan was not devised until after Garrett was advised by an attorney that he had insufficient grounds to fire her. It cannot, therefore, be disputed that defendants wanted to discharge plaintiff. The evidence shows that plaintiff failed to do necessary laboratory work which she was required to to and which she volunteered to do. Her friendship with Childress and the Mayor made attempts to discipline her unsuccessful. In the end, plaintiff substantially contributed to an unpleasant and ineffective work environment. It was for this reason and not because of her sex that defendants wanted to take action. The reclassification of the position was shown to be a reasonable restructuring of the wastewater treatment plant hierarchy designed to satisfy operating permit requirements with economic efficiency and to remedy the chaos that the system then in effect had allowed plaintiff to create. The mere fact that an employer's action adversely affects a female employee is not sufficient proof of disparate treatment under Title VII. A plaintiff must show an intent to discriminate because of her sex. *See Texas Department of Community Affairs* v. *Burdine*, 450 U.S. 248 (1981). Such a showing was not made here.

This court is of the opinion that plaintiff has failed to show that defendants' articulated reason is mere pretext for discrimination. Consequently the court concludes that plaintiff has not established that she was the victim of intentional discrimination in violation of Title VII.

Accordingly, the court concludes that the plaintiff's complaint should be dismissed with prejudice. A separate judgment shall be submitted in accordance with the local rules.

This the 2nd day of May, 1986.

/s/_____
UNITED STATES DISTRICT JUDGE

UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF MISSISSIPPI
EASTERN DIVISION

Civil Action No. E85-00011(L)

ANITA KAYE LOFTIN-BOGGS,

Plaintiff,

v.

CITY OF MERIDIAN, MISSISSIPPI; RICHARD BURNETTE, Individually and as City Manager; and JAMES L. GARRETT, SR., Individually and as Director of Public Works

Defendants.

MEMORANDUM OPINION AND ORDER

This cause is before the court on motion of the plaintiff for judgment notwithstanding the verdict or, in the alternative, for a new trial. The case was tried to a jury which returned a verdict for the defendant on all counts.

In *Boeing Co.* v. *Shipman*, 411 F.2d 365, 374-75 (5th Cir. 1969) (en banc), the Fifth Circuit Court of Appeals set out the standard of review governing consideration of a motion for judgment notwithstanding the verdict.

> On motions for directed verdict and for judgment notwithstanding the verdict the Court should consider all of the evidence—not just that evidence which supports the non-mover's case—but in the light and with all reasonable inferences most favorable to the party opposed to the motion. If the facts and inferences point so strongly and overwhelmingly in favor of one party that the Court believes that reasonable men could not arrive at a contrary ver-

> dict, granting of the motions is proper. On the other hand, if there is substantial evidence opposed to the motions, that is, evidence of such quality and weight that reasonable and fair-minded men in the exercise of impartial judgment might reach different conclusions, the motions should be denied, and the case submitted to the jury. A mere scintilla of evidence is insufficient to present a question for the jury. The motions for directed verdict and judgment n.o.v. should not be decided by which side has the better of the case, nor should they be granted only when there is a complete absence of probative facts to support a jury verdict. There must be a conflict in substantial evidence to create a jury question. However, it is the function of the jury as the traditional finder of the facts, and not the Court, to weigh conflicting evidence and inferences, and determine the credibility of witnesses.

This court has reviewed the evidence presented at trial as well as the memoranda submitted by the parties and concludes that plaintiff's motion for judgment notwithstanding the verdict should be denied.

Plaintiff moves alternatively for a new trial. In *Reeves* v. *General Foods Corp.*, 682 F.2d 515, 519 n.6 (5th Cir. 1982), the Fifth Circuit held that "the court may set aside a verdict and grant a new trial if the verdict is against the clear weight of the evidence." Plaintiff contends *inter alia* that the court's refusal to grant her jury instruction on the slander per se claim merits a new trial. This argument warrants discussion in light of a recent decision of the Mississippi Supreme Court, *Whitten* v. *Commercial Dispatch Publishing Company, Inc.*, No. 55,543 (Miss. Sup. Ct. Apr. 30, 1986). In *Whitten*, the Mississippi Supreme Court discussed *Ferguson* v. *Watkins*, 448 So. 2d 271 (Miss. 1985): "Central to our determination that the [plaintiffs in *Ferguson*] were public figures was the fact

that they were public employees employed by a public hospital. As such, they voluntarily entered the public domain." *Whitten*, slip op. at 3. In *Whitten*, where the alleged slander was in the form of a newspaper article, the court stated that the plaintiffs were "drawn into a public forum in an attempt to defend themselves against actions brought by others." At trial, this court found that plaintiff, a city employee, had thrust herself into the public eye through her initiation of repeated contacts with the press. Relying on *Ferguson*, the court held that the plaintiff had become a public figure for purposes of her slander claim. Boggs, like the *Ferguson* plaintiffs, was a public employee. Additionally, unlike the *Whitten* plaintiffs, Boggs herself drew the controversy into the public forum. Therefore, the court finds that, under *Whitten*, the slander instruction was properly denied.

Following review of the evidence, the court is of the opinion that the verdict for the plaintiff is not "against the clear weight of the evidence."

It is, therefore, ordered that plaintiff's motion for judgment notwithstanding the verdict or, alternatively, for a new trial is denied.

ORDERED this 17th day of June 1986.

/s/_____

UNITED STATES DISTRICT JUDGE

Supreme Court, U.S.
FILED
JAN 29 1988
JOSEPH F. SPANIOL, JR.
CLERK

No. 87-971

IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

ANITA KAYE LOFTIN-BOGGS,
Petitioner

v.

CITY OF MERIDIAN, MISSISSIPPI, JAMES L. GARRETT, SR., Individually and as City Engineer and Director of Public Works, and NEAL CARSON, Individually and as Assistant Director of Public Works,
Respondents

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

---

RESPONDENTS' BRIEF IN OPPOSITION

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Dated: January 29, 1988

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

QUESTIONS PRESENTED

1. Rule 3(c) of the Federal Rules of Appellate Procedure requires the appellant to designate the order or judgment being appealed. Loftin-Boggs' notice of appeal specifically designated only the district court's order ruling on the post-trial motion that dealt with her § 1983 and state-law jury claims. Did the United States Court of Appeals for the Fifth Circuit err when it ruled it had no jurisdiction to consider Loftin-Boggs' appeal of the dismissal of her non-jury Title VII claim because the notice of appeal did not refer to any order dealing with the district court's dismissal of that claim?

2. Respondents accept the second question as presented by the petitioner.

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RESPONDENTS' BRIEF IN OPPOSITION

STATEMENT OF THE CASE

Petitioner Loftin-Boggs' chemist position in the city of Meridian's waste water treatment plant was reclassified down to a laboratory technician position, resulting in a $4,000 reduction in annual salary. Claiming the reclassification constituted a constructive discharge, petitioner, acting through her retained counsel, John L. Maxey, II, filed suit in federal district court against the respond-

ents, City of Meridian, Garrett and Carson, asserting a non-jury Title VII claim and jury claims under 42 U.S.C. § 1983 and state-law.

The Title VII claim charged the respondents with sexual harassment, sexual discrimination and and retaliation. Loftin-Boggs' § 1983 claim alleged the respondents violated the First Amendment because they constructively discharged her for filing a grievance in which she complained about her employment conditions and that they violated the Fourteenth Amendment because they failed to give her a due process hearing before discharging her. No equal protection claim for sex discrimination was made under § 1983. The state-law slander claim was made only against respondent Garrett. (Vol. 2 at 156-72)[1]

A consolidated trial was held on the Title VII non-jury claim and the § 1983 and pendant state-law jury claims. At the conclusion of the 6-day trial, the district court on April 21, 1986, directed a verdict for the respondent Garrett on the state-law claim, submitted the § 1983 claims to a jury, which returned a verdict for the respondents, and took the non-jury Title VII claim under advisement. (Vol. 7, 1138-40; Vol. 2, 371; Supp. App. at 1-4). After the entry of the directed verdict and the return of the jury verdict, the following actions occurred:

1. On April 28, 1986, the district clerk filed the district court's Partial Judgment which dismissed the state-law and § 1983 claims. (Vol. 2, 390-91; Supp. App. at 7-8).

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[1] Citations are to the volume and page number of the record sent to the court of appeals and where available, to the Appendix (App.) or Supplemental Appendix (Supp. App.) filed by Loftin-Boggs with this Court.

2. On May 2, 1986, the district court issued its Memorandum Opinion finding that Loftin-Boggs had failed to establish her Title VII claim. (Vol. 2, 392-403; Supp. App. at 9-20).

3. On May 7, 1986, Loftin-Boggs, acting through Mr. Maxey, served a Rule 50 and 59 motion in which she asked the district court to grant a judgment notwithstanding the verdict or, alternatively, a new trial on her § 1983 and state-law claims. (Vol. 2, 404-06).

4. On May 8, 1986, the district court entered a Final Judgment incorporating by reference the Partial Judgment filed on April 28, 1986, and the Memorandum Opinion of May 2, 1986, and dismissed with prejudice all claims, to include the Title VII claim. (Vol. 2 at 407-08).

5. On June 17, 1986, the district court entered its Memorandum Opinion and Order denying Loftin-Boggs' post-trial motion. (Vol. 2 at 412-14; Supp. App. at 21-23).

On July 16, 1986, Loftin-Boggs, acting *pro se*, filed her notice of appeal. This was the first time Loftin-Boggs had undertaken to represent herself in this action. In the notice of appeal, Loftin-Boggs stated she was appealing "from the Memorandum Opinion and Order dated June 17, 1986." (Vol. 2 at 418; App. at 1a).

After the transcript and record were prepared, Loftin-Boggs in the latter part of December, 1986, again retained Mr. Maxey to represent her. Mr. Maxey prepared and filed all of Loftin-Boggs' appeal briefs.

Loftin-Boggs' initial brief to the court of appeals was served on February 13, 1987, and urged the court of appeals to reverse the district court on its dismissal of the Title VII claim and on its granting of a directed verdict on the state-law slander claim.

Respondents moved to dismiss for lack of jurisdiction Loftin-Boggs' appeal of her Title VII claim. Respondents

argued that the motion should be granted because the order designated in the notice of appeal dealt only with the § 1983 and state-law jury claims and because Loftin-Boggs had not designated any order or judgment dealing with the non-jury Title VII claim. After considering Respondents' motion and brief and the brief of Loftin-Boggs, which was prepared by and submitted through Mr. Maxey, the court of appeals on June 1, 1987, issued its order which stated in full: "IT IS ORDERED that the motion of appellee(s) to dismiss certain issues on appeal for lack of jurisdiction is GRANTED."[2] On June 16, 1987, Mr. Maxey filed a motion with the court of appeals requesting permission to withdraw as counsel of record because he had been instructed by Loftin-Boggs to "perform no further work in this matter." Loftin-Boggs joined in the motion and it was sustained by the court of appeals.

On July 10, 1987, the court of appeals issued its unpublished opinion affirming the district court's directed verdict on the state-law slander claim. (App. at 2a-7a).

On August 24, 1987, Loftin-Boggs, *pro se*, filed with the court of appeals a petition for panel rehearing, in which she asked the court to reconsider its affirmance of the directed verdict on the state-law slander claim, and a suggestion for hearing en banc, in which she asked the full court of appeals to reverse the panel decision that dismissed for lack of jurisdiction the appeal of her Title VII claim. On September 17, 1987, the court of appeals denied both requests. (App. at 8a-9a).

On December 14, 1987, Loftin-Boggs, acting again through her retained attorney, Mr. Maxey, filed the petition for writ of certiorari now pending before the Court.

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[2] This order is not included in Loftin-Boggs' Appendix or Supplemental Appendix.

With regard to the statement of facts as they relate to the second question presented in the petition, respondents incorporate by reference the facts set forth in the court of appeal's unpublished opinion. (App. at 5a-7a).

REASONS FOR DENYING THE WRIT

Loftin-Boggs' Title VII claim was dismissed by the court of appeals because she did not follow the clearly stated and easily understood requirement of Rule 3(c). As stated by Loftin-Boggs in her petition, this Court, the Fifth Circuit and other courts of appeal generally apply a liberal construction to a notice of appeal and permit an appeal to proceed as long as the notice of appeal clearly expresses an intent to appeal from a specific order or judgment. Loftin-Boggs' notice of appeal is not aided by such a liberal construction. The June 17, 1986, order designated in Loftin-Boggs' notice referred only to the § 1983 and state-law slander jury claims and under a liberal construction, does not express or indicate any intent to appeal from any order or judgment dealing with her Title VII non-jury claim.

Loftin-Boggs does not challenge the legal rationale of the "vortex public figure" or "limited purpose public figure" test applied by the court of appeals to her state-law slander claim. Her only complaint is that the court of appeals did not properly apply the test to the specific facts surrounding her claim. Her challenge overemphasizes the part played by the newspaper articles in the district court's and the court of appeal's decision. Other facts were involved in the lower courts' analysis and when those facts are considered, it is clear that Loftin-Boggs was a "vortex" or "limited purpose public figure".

I. DID THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT ERR WHEN IT RULED IT HAD NO JURISDICTION TO CONSIDER LOFTIN-BOGGS' APPEAL OF THE DISMISSAL OF HER NON-JURY TITLE VII CLAIM BECAUSE THE NOTICE OF APPEAL DID NOT REFER TO ANY ORDER DEALING WITH THE DISTRICT COURT'S DISMISSAL OF THAT CLAIM?

Rule 3(c) of the Federal Rules of Appellate Procedure states in part: "The notice of appeal . . . shall designate the judgment, order or part thereof appealed from; . . . ." In *C. A. May Marine Supply Co. v. Brunswick Corp.*, 649 F.2d 1049 (5th Cir.), *cert. denied*, 454 U.S. 1125 (1981), the court of appeals explained when and why it would liberally construe a notice of appeal in determining whether it met the "designation" requirement of Rule 3(c):

> . . . . [A] policy of liberal construction of notices of appeal prevails in situations where the intent to appeal an unmentioned or mislabeled ruling is apparent and there is no prejudice to the adverse party . . . . The party who makes a simple mistake in designating the judgment appealed from does not forfeit his right of appeal where the intent to pursue it is clear . . . . Also, where claims or issues are inextricably entwined, each may be reviewed even though not referred to in the notice of appeal . . . .

649 F.2d at 1056 (citations omitted).

As noted by Loftin-Boggs in her petition, this Court and other circuits have adopted this approach. See Petition at 5-6 & n.2.

In *C. A. May Marine Supply Co. v. Brunswick Corp.*, the court of appeals went on to distinguish the above-described situation from the situation where an appellant specifically designates one order or judgment but does not designate another unrelated order or judgment:

> Where the appellant notices the appeal of a specified judgment only or a part thereof, however, this

> court has no jurisdiction to review other judgments or issues which are not expressly referred to and which are not impliedly intended for appeal . . . . In this situation, because the intent to appeal is not apparent, prejudice to the adverse party is likely to result if review is granted. Where parts of the judgment are truly independent, there is more likelihood that the designation of a particular part in the notice of appeal will be construed as an intent to leave the unmentioned portions undisturbed.

649 F.2d at 1056.

Loftin-Boggs does not address this situation and does not point to any decision by this Court or by any other court of appeals which disagrees with the Fifth Circuit's rule for interpreting this type of notice of appeal. In fact, several other circuits have also interpreted notices of appeal designating a specific order in the same manner. *E.g.*, *Brookens v. White*, 795 F.2d 178, 180 (D.C. Cir. 1986) (Per curiam); *McLaurin v. Fischer*, 768 F.2d 98, 101-02 (6th Cir. 1985); *Pitney Bowes, Inc. v. Mestre*, 701 F.2d 1365, 1374-75 (11th Cir.), *cert. denied*, 464 U.S. 893 (1983); *Elfman Motors, Inc. v. Chrysler Corp.*, 567 F.2d 1252, 1254 (3rd Cir. 1977); *accord, Ingraham v. United States*, 808 F.2d 1075, 1080 (5th Cir. 1987).

Having failed to show any conflict with this Court's prior decisions or the decision of any other court of appeals, it becomes apparent that Loftin-Boggs' only basis for her petition on this question is her argument that the court of appeals was wrong in its decision to dismiss her Title VII claim for lack of jurisdiction. She is wrong on this point. The cases Loftin-Boggs cites to support her argument (Petition at 5-9), all involved a situation where the order mentioned in the notice of appeal was clearly related to the unmentioned or misdesignated order. That is not the case here.

The June 17, 1986, order designated in the notice of appeal dealt only with the § 1983 and state-law slander

claims. It had nothing to do with Loftin-Boggs' non-jury Title VII claim.

Although the Title VII, the § 1983 and the state-law slander claims all arose out of Loftin-Boggs' employment relations with one or all of the respondents, that relationship, standing alone, does not mean that the issues and law involved in those claims are "inextricably entwined". A review of the claims shows that they certainly are not. The Title VII non-jury claim alleged sexual discrimination and harassment and retaliation. On the otherhand, the § 1983 jury claim charged respondents with violating Loftin-Boggs' First Amendment right to freedom of expression and her Fourteenth Amendment right to procedural due process and the state-law slander claim was based upon common-law tort concepts and the First Amendment's concept of the "vortex" or "limited-purpose" public figure.

It takes more than a liberal construction of Loftin-Boggs' notice of appeal to infer that she intended to appeal her Title VII claim when she designated the June 17, 1986, order. To do that a court must completely ignore the requirements of Rule 3(c).

II. WHETHER THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT PROPERLY AFFIRMED THE LOWER COURT'S DISMISSAL OF HER SLANDER CLAIM ON THE GROUND THAT PETITIONER WAS A VORTEX PUBLIC FIGURE

Loftin-Boggs points to no decision by this Court or by any other court of appeals which conflicts with the "limited-purpose public figure test" applied by the Fifth Circuit in affirming the district court's granting of a directed verdict on Loftin-Boggs' state-law slander claim. Loftin-Boggs' only complaint is that the test was not properly applied to the facts of her claim. For the reasons set forth in the district court's and the Fifth Circuit's opinions, respondents contend that Loftin-Boggs is

wrong. See Appendix at 2a-7a; Supp. App. at 2-3, 21-23.

CONCLUSION

For all of the foregoing reasons, the petition should be denied.

Respectfully submitted,

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